

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY TERRY HAMILTON,

Defendant-Appellant.

UNPUBLISHED

March 18, 2004

No. 244184

Oakland Circuit Court

LC No. 2000-172565-FH

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and sentenced as a third habitual offender, MCL 769.11, to a term of 12-1/2 to 20 years' imprisonment. In a prior appeal, this Court affirmed defendant's conviction but vacated his sentence and remanded for resentencing because the trial court failed to provide substantial and compelling reasons for departing from the statutory guidelines range of 38 to 114 months.¹ Defendant was resentenced within the guidelines to a term of 9-1/2 to 20 years' imprisonment, a guideline sentence. He again appeals as of right. We affirm.

I

Defendant contends that the trial court violated MCR 6.425(D)(2) by failing to ask him or his counsel whether they had had an opportunity to read and discuss the presentence investigation report ("PSIR"), by failing to give defense counsel an opportunity to explain or challenge any information in the PSIR, and by failing to give defense counsel an opportunity to allocute before the court imposed sentence. MCR 6.425(D)(2) provides that the sentencing court must:

(a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,

¹ The facts of this case are set forth in this Court's prior opinion, *People v Hamilton*, unpublished opinion per curiam, issued June 14, 2002 (Docket No. 231965).

(b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule (D)(3),

(c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence,

* * *

Whether MCR 6.425(D)(2)(c) was violated is a question of law that this Court reviews de novo. *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002). Resentencing is required where the trial court fails to comply with this rule. *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999). As our Supreme Court explained in *Petit*, *supra* at 628:

[T]his court rule means that the trial court must make it possible for a defendant who wishes to allocute to be able to do so before the sentence is imposed. However, in order to provide the defendant an opportunity to allocute, the trial court need not "specifically" ask the defendant if he has anything to say on his own behalf before sentencing. The defendant must merely be given an opportunity to address the court if he chooses.

Here, the trial court opened the proceeding by stating, "I'll just go ahead and resentence. Is there anything you wish to say before I pass sentence?" Defendant responded by denying guilt and commenting at length on his good prison record. We view the open-ended question, "Is there anything you wish to say" as the extension of an opportunity to both defendant and his counsel to comment on the PSIR and allocute regarding any circumstances thought to be relevant to defendant's sentence in accordance with MCR 6.425(D)(2)(b) and (c). While defense counsel did not add to defendant's presentation, the court did not prevent her from doing so.

While the court did not comply with MCR 6.425(D)(2)(a), which requires the trial court to determine that the defendant, his counsel, and the prosecutor have had an opportunity to read and discuss the PSIR, defendant admits that counsel had the PSIR and gave it to defendant, although counsel failed to review the report with defendant. The fact of the first appeal from the sentence imposed, the utilization of the corrected information as contained within the PSIR, and the filing by counsel of a sentencing memorandum belie the assertion of inadequate review with counsel. Defendant has since had the opportunity to review the report and asserts several inaccuracies. We conclude that resentencing is not required. Most of the objected-to information was corrected, clarified or placed in context in other sections of the report. Other information was either irrelevant or fairly supported by the record.

II

Next, defendant raises a number of challenges to the scoring of the statutory guidelines. However, we need not review the individual challenges because even if we credit defendant's arguments and reduce his total offense variable and prior record variable scores to the full extent, the revised scores would still place defendant at OV level VI (seventy-five or more points) and

PRV level E (fifty to seventy-four points). MCL 777.16d; MCL 777.65. Thus, the alleged scoring errors would not affect the sentencing guidelines range.

Defendant argues that the trial court should have considered mitigating circumstances, such as his favorable prison record, his prearrest employment record, his successful heroin abuse treatment, and factors casting doubt on his guilt. Defendant presented these matters to the trial court in his Sentencing Memorandum filed before resentencing and in his verbal statement to the trial court. The trial court acknowledged his good adjustment. Because the trial court already had the opportunity to consider these matters, there is no cause for granting further relief. Further, the court's implicit conclusion that these factors did not outweigh the permanent, severe, and life-altering injuries to the victim was well within its discretion.

III

Defendant asks this Court to determine that his lower court motion for resentencing was timely filed. He contends that his counsel delivered the motion to the trial court via Federal Express within the fifty-six-day period prescribed in MCR 7.208(B)(1), and that Federal Express records show that the motion was received by the court on the correct day, but was not filed until the following day.

This Court denied defendant's motion to deem the resentencing motion timely filed or to extend the deadline by one day on the ground that it lacked jurisdiction to do so. Nonetheless, on June 18, 2003, the trial court addressed and denied the motion. Regardless of whether the motion was timely filed, because it was considered and denied by the trial court, it is now clear that even if we were to determine that the motion was timely filed under MCR 7.208(B)(1), it would not cause the trial court to grant sentencing relief. Accordingly, it is unnecessary to consider this issue further.

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Pat M. Donofrio